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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FREDERICK H. GREIME,
Libelant and Appellant,

vs.

Steam Vessel "DAISY", etc., S. S. FREEMAN,
Claimant and Appellee.

BRIEF FOR APPELLANT.

H. W. HUTTON,
Proctor for Appellant.

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Statement of Facts.

During the month of April, 1920, appellant, who was an able seaman on the steam vessel "Daisy", was struck on the left temple and seriously and permanently injured by a hook that was attached to the end of a wire winch fall, while he was receiving and stowing lumber in the hold of that vessel as she was lying alongside of a wharf at Knappton in the State of Washington.

The direct cause of his injuries were that the vessel left San Francisco, where libelant shipped and the vessel was owned, with the wire falls on

the vessel too short for the work of loading lumber on her and that necessitated the operation of her winches in a manner contrary to the way they had been designed and constructed to be operated.

The facts are the vessel had two winches one forward and one aft. On each was a shaft that was operated by the steam engine of the winch. At about the center of its length was a friction wheel and on each side of the friction wheel a drum loose upon the shaft. When it was sought to cause one of the drums to revolve the winch driver, who stood at the winch with a lever that controlled the throwing in of one of the drums one in each hand, pulled on that lever and it would throw the drum up on the friction and the engine would cause the drum to revolve. When it was sought to release the drum he slackened on the lever and it was supposed to automatically release itself from the friction; but the testimony is, *that the drum did not always do so.*

Around each drum was a wire fall, each of which ran through a block at the foot of one of the masts of the vessel, and, stepped into the foot of each mast, were two booms that led upward and outward so as to form a "V". Each fall ran up one of the booms, then through a block at the outer end of each boom and then were brought down and together, and hooked into a contrivance made up of a chain, a pennant and a hook, that was called the "blacksmith's shop". In loading, the upper end of one boom would be set out a little over the vessel's side, and the other over the offshore rail of the vessel, the

outer end of which would be a little higher than the inshore boom; the upper and outer ends of the booms when so set being about 50 feet or more apart.

In loading the vessel, the winch driver would cause the inshore drum to revolve and allow the offshore drum to run loose and thus pull the "blacksmith's shop", over the wharf. It would then be hooked on to a load of lumber and he would hoist it off the wharf with the inshore drum. When so hoisted, he would hold its weight with the inshore drum and then cause the offshore drum to revolve and swing the load of lumber out over the vessel, and lower it with both drums down where it was desired to land it, when it would be unhooked and the operation repeated until the vessel was loaded. The winches were constructed to be operated with both ends of the wire falls attached to the "blacksmith's shop" that is alleged in paragraph III of the amended libel (Trans. pg. 6), and is admitted in the answer. It is alleged in the libel also that the winch could not be safely used any other way. The safety matter is denied in the answer. We will take that up later.

When first commencing to load, the lumber would be right alongside of the vessel. As it was worked into the vessel, however, it would be necessary when they took that, to take what was piled up further out to drag it over the wharf, the vessel having to take up to what was 60 feet away from her side.

On the day in question they commenced work at 8 A. M. and worked up to about 11.45 A. M. at which time the lumber had been taken away from

the side of the vessel to such a distance, that the offshore fall was too short to do the work and it was found necessary to unhook it, drag the inshore fall out to the load, hook that on to the load, then drag it into the side of the vessel, attach the offshore fall and so proceed in landing the load on the vessel.

It appears in the testimony that that method of loading lumber had been used by all vessels on the Pacific Coast for years. When the offshore fall was so disengaged, it would be attached to a pile, if there was any pile near enough; if not one of the stevedores would hold the rope in his hand while the process of hauling the load over the wharf by the inshore fall was going on, and it frequently happened that the offshore drum would revolve and pull it out of his hands. That is what happened in this instance, why no one seems to know, and the hook at the end of the fall flew down and struck appellant, inflicting the injuries mentioned.

Of course if the end of the offshore fall had remained attached to the "blacksmith's shop" appellant would not have been injured. The question in this case then is, Why was it detached? The only testimony in the case, that is testimony, on what caused them to detach that fall, *is that the fall was too short.*

It appears that they have had a habit of fixing the lengths of the wire falls on a winch, without any regard to what the winch had to do, but arbitrarily making them three times the length of the vessel's boom; thus a vessel with a 40-foot boom would have

falls 120 feet in length, a vessel with a 70-foot boom would have one 210 feet in length. This vessel with a 56-foot boom was supposed to have one 168 feet in length. There is no *legal* evidence in the case though as to what its length actually was. Whatever its length was, however, it was too short. The vessel was sent up to get a load of lumber; the shipowner furnished the appliances; those on the vessel were compelled to use what appliances were furnished and in the absence of any testimony in the case, the presumption is that they did the best they could with what were so furnished by the owner.

Some of the evidence was taken by deposition, and some by the court. The lower court did not see all the witnesses. There is, however, little or no conflict in the evidence; if there was, the rule of this court that, where the lower court has seen the witnesses and there is a conflict, this court will not disturb the findings of the lower court, does not apply.

The matter as to the falls being too short came in by amendment after the testimony of Paul Frank the winch driver, was taken on behalf of the claimant. Appellant was down in the hold of the vessel when struck; was unconscious for about three hours; when he recovered consciousness he was in a hospital and never knew what was the real cause of his being struck until Frank's deposition was taken. He knew that the winch was being used contrary to the way it was designed to be used, but did not know why it was being so used. The winch driver first gave him correct information and he amended to suit the proofs.

Argument.

I.

Appellant relies upon all of his assignment of errors, herein and submits to the court that the finding of the lower court:

> "The injury to libelant however much it is to be regretted, was not caused by any faulty equipment, but by the careless use of the equipment with which the vessel was supplied",

is contrary to all of the evidence in the case; that if there was any carelessness on the part of those on board of the vessel, which we have been unable to find any evidence of, that carelessness was directly caused by the previous negligence of the owner of the vessel in furnishing improper equipment, to wit: falls that were too short, and if such is the fact, the owner's negligence contributed to the injury and he is liable.

The duty of the owner of a vessel is laid down in the case of The Osceola, 189 U. S. 159, and afterwards repeated in Chelentis v. the Luckenbach S. S., 247 U. S. 381, and is:

> "That the vessel and her owners are both by English and American laws liable to an indemnity, for injuries received by seamen in consequence of the unseaworthiness of the ship, *or a failure to supply and keep in order, the proper appliances appurtenant to the ship.* Scarff v. Metcalf, 107 N. Y. 211."

It will be observed that the language is, "supply *and keep in order*". There is a duty to supply in the first instance, and a *continuing duty to keep in order.*

The rule was laid down in the Osceola case prior to the state compensation laws, and we have no doubt the court had its own language in the case of Hough v. R. R. Co., 100 U. S. 213, reading:

> "Its duty in that respect to its employees is discharged when, *but only when,* its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally *as in keeping and maintaining them in such condition* as to be reasonably and adequately safe for use by employees",

in mind when it laid down the rule in the Osceola and Chelentis cases, as the rule is identical with what is laid down in the above Hough case.

When it was finally determined that state compensation laws did not apply on board vessels, it left the law just exactly where it was before such compensation laws were adopted, and no ground can be found for the ruling of some courts, that the responsibility of the owner ends with the furnishing of a seaworthy vessel at the commencement of the voyage. *The duty is a continuing one,* and the language on the duty of the owner is exactly the same in the Chelentis case decided in 1918 as it was in the Osceola case decided in 1903. We will now take up what happened in this case: The rope was disconnected to enable those on board to load the vessel, three times the length of the boom, without any regard to what the actual requirements were, had developed a custom on the Pacific Coast to unhook the offshore fall. The proof is that that frequently led to the fall being pulled out of the hands of those

who held it, that the loose drum frequently revolved and the man had to let go.

We respectfully submit that it was the duty of the owner to know what was going on on the vessel. They knew the lumber had to be hauled up to 60 feet over the wharf, and it was their duty to see by measurement that a fall sufficiently long was supplied. The following is the only evidence in the case on whether the fall was long enough or not. Claimant's witness Frank, page 67, by deposition:

> "Q. Just describe the manner of using the ships gear?
> A. The ship's gear, the ship's gear has to be disconnected, the falls, for to reach the last pile.
> Q. Why?
> A. Why, because it is impossible, it is customary in steam schooners since many and many a year, and simply has to be done, to reach the last pile, so that the falls get disconnected and are connected again by means of a little pennant.
> Q. You say that you had to disconnect them in order to reach the last pile; just why is it, why don't you leave both falls connected together when you are taking lumber from the dock? A. It won't reach.
> Q. It won't reach?
> A. The lumber, no, because one fall is too short.
> Q. The off-shore fall is too short? A. Yes.
> Q. Is it any shorter than the in-shore fall?
> A. No, it is the same length, but the off-shore boom is setting out.
> Q. Who directed that the falls be disconnected at the time of the accident?
> A. The mate.

Page 79.

Q. Is it customary or not to use the method employed on the Daisy?

A. It is a necessity.

Q. Well, is it customary or not among lumber schooners plying up and down the coast?

A. Yes surely; we have to."

Carl Johan Carlson, master of the Daisy, by deposition:

"Q. After you had straightened the fall out and pulled in a load of lumber to the edge of the wharf with the in-shore fall, would you hook onto the off-shore fall then when you swung it over the ship?

A. There are no other means of getting the lumber aboard the ship except to hook on the off-shore fall, as soon as the load is to the edge of the dock."

By the testimony of Christian Evanson, master of steam schooners, called by claimant and testifying in court; the falls in this case were shorter than the ordinary fall, he testified in part:

"Q. What is the *ordinary* length of a steam schooner falls, do you know?

A. From 200 to 235 feet.

* * * * * * *

Q. With a 210 foot wall, has it been customary, or not, in taking lumber from up the dock, to disconnect the falls? A. Yes.

* * * * * * *

Q. Have you ever used this method of disconnecting falls at the time you do up the dock to get lumber? A. If it is necessary, yes.

Q. When is it necessary? Why do you use it?

A. When you cannot reach it with*out* your off-shore fall.

Cross-Examination.

Q. If the off-shore fall was longer; it would reach, would it not? A. Sure it would.

Q. It would not have to be any longer, than the distance that the outer ends of the booms are apart, would it? A. That is right.

Q. That is correct? A. Yes.

Q. Have you ever seen a stevedore placed to hold that hook in his hand? A. Yes.

Q. And he frequently lets go don't he?

A. I have seen them let go, yes.

Q. Would it be impracticable to put on sufficient cable to reach up the dock the ordinary distance that you find the lumber so that you could leave both falls connected together, and go up the dock and pick up this lumber and bring it to the ship side?

A. It could be done all right, but it is not practicable in one way, you got so much wire on the drum and it is harder to pull the two falls back on the dock.

Q. You mean harder for the man?

A. Harder for the man to drag the hook along with the two falls.

Q. Would it have any effect on the cable itself?

A. I don't know, not unless they got so much on the drum it would chew up the cable.

Q. Would it have any effect upon the ability of the winch-man to operate the winch?

A. No, I do not think so."

Of course if the vessel had her other side to the wharf, the offshore fall would be the present inshore fall. What was required was falls that, no matter which side of the vessel lay to the wharf, the offshore fall would be long enough to reach without unhooking it.

There was a failure to supply a proper appliance in this case. The only thing that appears in the

case on the part of claimant is the testimony of one of the claimants, S. S. Freeman. What he testified to was that the booms were 56 feet in length, and the falls 180 feet in length (Trans. pg. 56). Just how he could testify to that fact, does not appear, for after so testifying on direct examination on page 56, on cross-examination, page 58, he says he never measured the falls and did not even know where they were bought. He supposed at Foard Barstow however. We respectfully submit that that is not evidence. Again he is apparently a shipowner. It does not appear that he ever went on board a vessel and operated her; it does not appear that he had ever been a seafaring man; he knew nothing according to his own evidence of the custom that prevailed of detaching the offshore fall on account of its not being long enough; he was not on the ground when appellant was injured, still he expresses an opinion that the falls were long enough. That is only an opinion—the opinion of a man based upon nothing, and is entitled to no weight as against the evidence of the winch driver who was on the ground, and the fact that it appeared in evidence that the rule that Mr. Freeman followed of three times the length of the boom, caused about every ship that loaded lumber to detach the offshore fall. They seem to have had to do so or be unable to load the vessel.

It is certain that if the three to one rule had provided an adequate length, that would not have been necessary. Mr. Freeman says he knew nothing about such a practice. The fact that he knew nothing about the practice, when every one was doing it,

shows his incompetence as a seafaring man and his lack of knowledge of what was required.

His testimony given in court in so far as it relates to the length of the falls is as follows:

> "and the booms on that boat are 56 feet long; the falls are 180 feet. All the cargo is supposed to be delivered within 60 feet of the vessel's tackle in sheltered ports, and those falls are plenty long enough for that."
>
> * * * * * * *
>
> Cross-Examination.
>
> "Q. Have you ever measured the falls on the 'Daisy' yourself? A. I have not.
>
> Q. You left that to the captain and the mate, did you not?
>
> A. No, we order those through the office, we order them from a ship chandler, and they are measured by the ship chandler.
>
> Q. It is the office then, that regulates the length of the wire; is that right?
>
> A. Just what they order; those are the falls that they always have been using on these boats.
>
> Q. The captain sent in and told you how long to make them?
>
> A. The captain does, yes, he puts in a requisition."

That shows Freeman knew nothing of his own knowledge as to how long the falls were; but if they were 180 feet, they were shorter than an ordinary fall, as the testimony is that an ordinary fall is from 200 to 235 feet long.

The duty of the shipowner is shown in the following cases: First, it is their duty to use ordinary care, and the fact that others were doing the same thing is no test as to whether ordinary care is being used:

Wabash R. R. Co. v. McDaniels, 107 U. S. 454, where the selection of an employee was involved, but the Supreme Court says, the test as to instrumentalities was the same.

> "A degree of care ordinarily exercised in such matters *may not be due,* or reasonable or proper care, and therefore not ordinary care within the meaning of the law."

Texas & P. R. Co. v. Behymer, 189 U. S. 468:

> "What is usually done may be evidence of what ought to be done; but what ought to be done is fixed by a standard of reasonable prudence whether it is usually complied with or not."

Can it be reasonable prudence to have kept sending vessels to sea with a fall three times the length of the boom, as on the evidence in this case?

Nyback v. Champagne Lumber Co., 48 C. C. A. 632:

> "Common sense and reason do not lose their sway because, through ignorance, inattention or selfishness, unreasonable custom may have prevailed."

Both ignorance and inattention on the part of Mr. Freeman is shown by his testimony.

Redfield v. Oakland C. Ry. Co., 112 Cal. 220, 224:

> "Custom may originate in motives of economy, or the stress of pecuniary affairs, or in recklessness, and not from considerations based upon proper discharge of their duty towards others using their cars."

Labatt on Master & Servant, Section 947:

"It is submitted, there is no sufficient basis upon which to found an inference of law that an employer fulfills his duty when he adopts instrumentalities and methods in common use."

And that is all we have in this case.

Burton v. Greig, 265 Fed. 418:

"I am satisfied that it is the duty of the ship and of her owners, not only to furnish a seaworthy ship and appurtenances at the beginning of the voyage, but to keep both the ship and her appurtenances in this condition. (Rule in Osceola case then quoted.)

Now, while the court here used the expression 'keep in order' in reference to the appliances appurtenant to the ship, it seems to me the same rule must necessarily be applied to the ship as to the appurtenances. While this is true, I do not consider that either the ship or her owners are insurers of the ship and her appliances."

Berg v. Philadelphia & R. Co., 266 Fed. 891:

"The failure to supply a proper eubolt and to keep it in order brings the case under the rule of the Osceola, and renders the vessel and owner *liable to indemnity for injuries, and not for mere care and cure.*"

Corrado v. Pederson, 249 Fed. 165,

decided by his Honor Judge Dooling, we think in square conflict with the decision in this case.

The Dredge No. 13, 264 Fed. 135:

"The law applicable is well settled, namely, that the employer did not fulfil the duty imposed upon it by merely furnishing a reason-

ably safe place in which to work, and suitable appliances such as would have been provided by persons of ordinary prudence engaged in like business under similar circumstances and conditions, but owed the further duty to maintain the same, *which involved the duty of reasonable inspection,* to the end that the boiler would be kept in reasonably safe condition and for injuries arising from failure in this respect is liable."

(Page 177.) "The duty of inspection imposed upon the owners was *a non-assignable duty,* which would not be fulfilled by merely appointing some one for that purpose. It was incumbent upon the respondent to show that it had discharged its duty in that respect, and that the person appointed discharged his duty. The obligation is a positive one, and of a continuous character, the service to be seasonably performed; and for injuries arising from failure in these respects the respondent is liable." (Citing many cases.)

The duty devolved on someone in this case to see what the results of the appliances as furnished were. If it devolved on Mr. Freeman, there is no evidence that he performed it; if it devolved on the master of the vessel, he was the representative of the owners for that purpose, and his negligence was their negligence. The master knew how the winch was being used for he so testified.

Section 20 of the Seaman Act as it then stood removes the master and all the officers at that time from the position of fellow servants. See the

Baron Napier, 249 Fed. 126.

Cricket S. S. Co., 263 Fed. 523:

In that case the vessel was held liable because a winch fall was made of wire rope that, it was held, was too stiff. We can see no distinction between a wire rope that was too stiff and one that was too short. Those on the ship used it, however.

Storgard v. France, etc., 263 Fed. 545:

> "If the bolt was worn and defective, and the shipowner knew of it *or ought to have known the fact.* It makes no difference whether they as reasonable men would not have appreciated the particular accident which actually did happen. The evidence was that the sailors always used this ring on their way to the topmast. *The seamen were bound to use the equipment and appliances which the owner furnished,* and they were on their part bound to furnish and maintain equipment and appliances for the seamen to use, at least free from defects known or which might have been known. It is intimate and peculiar, and differs from that between master and servant, who may at any time withdraw from service and refuse to use tools and appliances which they think dangerous. Employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of employers of these servants."

We respectfully submit that, under the test of any one of the above authorities, the decree herein should have been for the libelant.

II.

If the court's decision herein was based upon the use of the article in question, the ship is still liable.

The law is clear upon that, if there was original negligence of the employer, contributing negligence of a fellow servant will not relieve the employer from liability.

Patton-Tully Transf. Co. v. Turner, 269 Fed. 344, *339*.

Kreigh v. Westinghouse & Co., 214 U. S. 249, 257:

> "If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work." (Cases cited.)

That decision lays down in other than the above quoted part a complete statement of the respective duties of the employer and employee, together with the latter's rights.

Globe S. S. Co., 245 Fed. 54.

III.

A seaman does not assume the risk of defective appliances.

The Colusa, 249 Fed. 21;
The Fullerton, 167 id. 1.

IV.

It does not appear in this case what caused the longshoreman to let go the line. It is in evidence

that men similarly situated frequently had to let go of them. We must assume that it was dragged out of his hands. The fault arose, however, in furnishing an appliance that had to be used in that way.

V.

The furnishing of the short fall forced those on board to disconnect the ends of the wire falls.

Someone on that vessel represented the owner. It will not do to say that an owner can send a vessel to sea and be free from responsibility for all future happenings. The detaching of the falls made the appliances unsafe, otherwise appellant would not have been injured. We will cite the following, which is the law on that subject:

> Labatt on Master and Servant, Section 923:
>
> "If new functions are imposed upon an instrumentality by the master himself or his representative, and the servant is thereby exposed to undue risks, the master must answer for any injury resulting from those risks, and cannot excuse himself by showing that the instrumentality was a suitable one for the performance of the work for which it was originally supplied. The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose."

We hardly think it can be the law that Mr. Freeman and all the other shipowners on the Pacific

Coast can lay back and allow what the evidence shows as going on in the use of their three times the length of the boom falls, and escape responsibility; put the master and seamen in a position of either using defective appliances or bring back an empty ship, with attendant discharge, and be held blameless. Nor do we think there is any decision of the Supreme Court of the United States that holds that the liability of the owner ends when the vessel starts on her voyage. We know of none. On the contrary, all the decisions we can find hold the other way.

If such were the law, no seaman could ever recover. It is on the voyage, not in the home port, that a seaman is usually injured. He usually joins the vessel just as she is about to leave port, and we are certain that the Supreme Court never intended that the rule laid down in the Osceola case should be so construed as to relieve a shipowner from all responsibility for what happened after the vessel left port. His duty to keep the appliances in order contemplates a continuing liability and responsibility that does not end with the departure of the vessel from port. In the Chelentis case, which seems to be the foundation of the theory, the man was injured by a heavy sea, which, of course, was no one's fault. But in this case the vessel did not leave port in a proper condition. The evidence is uncontradicted that the falls were too short. Mr. Freeman's opinion is based upon the three times the length of the boom practice, and all the evidence is that all ves-

sels with falls so computed have to adopt the same method as was adopted in this case. If Mr. Freeman had offered any testimony from actual knowledge, the fact all vessels on the coast did the same as the Daisy did, would be a complete refutation of his opinion that the falls were long enough.

We respectfully submit that the following part of the finding of the lower court,

> "The injury to libelant, however much it is to be regretted, *was not caused by any faulty equipment*",

is against all the evidence, as an equipment must be faulty that leads to and compels the disarrangement of a steam winch to enable the work to be done; and again, an appliance must be faulty when it is furnished not by regard to the work it has to do, but on account of an arbitrary practice, in which fitness is not taken into account.

We respectfully submit, also, that the following finding of the lower court is against all the evidence, to wit:

> "but by the careless use of the equipment with which the vessel was supplied."

The finding itself comprehends that the equipment could have been used in a more careful manner, or in another manner. There is nothing in the record tending to show that it could have been used in any other manner, or a safer manner. On the contrary, all the testimony is that all vessels with winch falls on a three times the length of the boom basis were compelled to operate the winch the same as it was

operated on the Daisy. If claimant had shown some other way the winch could have been operated there might be some basis for that finding, something to speculate on, at least; but there is nothing in this record upon which such a finding can be predicated.

It is true that some mention is made of fastening the hook to a spike; but it was the short fall, the fault of the owner that would occasion such fastening, and the evidence is not clear that that would have remedied matters, as sometimes the friction does not work. Testimony of Henry A. Larson:

> "Q. Now, when one drum is thrown in on the friction and the other is not thrown in, is there any liability of that other drum revolving in those winches? A. Yes.
>
> Q. What would make it revolve?
>
> A. A little grease in the friction there, or a little dirt, or if they have been heaving a heavy load, it naturally forms in that wood a sort of groove in there; the drum is liable to stock, when they throw up on the lever, that drum might not be thrown off this friction, without the winch driver knowing it, and sometime he, not knowing it, it will turn over.
>
> Q. Do they do that frequently?
>
> A. Yes. I have seen it jam so hard that you will have to take a block of wood and knock the drum out, to leave her release; that happens frequently."

It seems that special care should be taken to have a fall long enough under such circumstances. One of the witnesses said that if the fall was fastened to a spike, the spike would have to be a strong one.

The evidence as to the distance they were dragging the lumber across the wharf is all found in the testimony of Frank, the winch driver. Appellant did not know; he was down in the hold. If they were dragging over the 60 feet it was within the power of claimant to prove it. The fact that they did not prove that to be a fact shows they could not prove it. The only positive testimony Frank gave on that subject was as follows:

> "Q. At any rate, you were only pulling the stuff, the lumber or piles, whatever it was you were moving, from thirty to fifty feet away from the edge of the wharf, and pulling them over to the edge? A. *Yes.*"

On redirect examination he showed some doubts as to his knowledge. On that point the above was a positive answer, however; but if they were exceeding the 60 foot limit at the time it would have been easy for claimant to have proven it. The fact that they did not do so shows any testimony they may have had on that point would have been adverse.

We respectfully submit that for the foregoing reasons the decree of the lower court herein should be reversed.

Dated, San Francisco,
February 11, 1922.

H. W. Hutton,
Proctor for Appellant.